(1) 97 • 502 SEP 16 1997

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1997

THAI PHAM

Petitioner,

v.

U.S. DEPARTMENT OF JUSTICE;
IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition for a Writ of Certiorari
To The United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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September 15, 1997

25 pp

QUESTIONS PRESENTED

(1) Can Congress deny petitioner of a hearing? Can Congress, by eliminating the U.S. Court of Appeals' original jurisdiction of a deportation defense, exempt permanent resident aliens of constitutional protection? May Congress constitutionally create a statutory bar that prohibits a permanent resident alien, convicted of an aggravated felony, from bringing a constitutional defense to any court to defend against his own deportation?

(2) Is the statutory bar to judicial review of deportation due to aggravated felony unconstitutionally overbroad?

LIST OF PARTIES TO THE PROCEEDING

All of the parties to the proceedings in the Immigration Court, the Board of Immigration Appeals, and in the U.S. Court of Appeals appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below. The Court of Appeals below has refused to grant a hearing to the petitioner of his defense to deportation. The Court of Appeals erred in seeing itself as the court of judicial review. It is the court of original jurisdiction to hear petitioner's claim which has never been heard.

The reason petitioner's claim has never been heard is because no court below the Court of Appeals has jurisdiction to hear a defense when that defense attacks the constitutionality of an act of Congress. Congress has effectively insulated its legislation from the Constitution.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A1 to the petition and is unpublished.

The opinion of the Board of Immigration Appeals appears at Appendix A3 to the petition and is unpublished.

The opinion of the Immigration Court appears at Appendix A5 to the petition and is unpublished.

JURISDICTION

The Court of Appeals entered an order on June 19, 1997, dismissing petitioner's appeal for lack of jurisdiction. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in the Appendix to this Petition.

STATEMENT OF THE CASE

Petitioner, Thai Pham, is a foreign national of Vietnam. However, he has lived in the United States since the age of two, and he obtained permanent residency at age four. He cannot speak Vietnamese, only English. Mr. Pham considers the United States to be his home country. He has no memory of Vietnam, and as such, it is foreign to him.

He was ordered deported by the Immigration Judge on the basis of an aggravated felony conviction. The conviction was the result of his involvement in a love-triangle dispute. Mr. Pham discovered that his girlfriend had a sexual relationship with another man. At age 18, Mr. Pham confronted the man after the man assaulted his girlfriend. Mr. Pham attempted to scare the man away with a gun by firing a warning shot. The warning shot missed the man, but caused a small piece of the sidewalk to come loose and hit the man in the leg. In the subsequent criminal

proceedings, Mr. Pham was represented by a public defender because his family disowned him. He plead guilty to the charge of felonious assault and was convicted and sentenced to 3 to 15 years in prison.

Mr. Pham was ordered deported by the Immigration Judge, and the BIA upheld this decision. Mr. Pham argued to the BIA that the statutory bar to 212(c) relief violated his rights under the Equal Protection Clause. The BIA, having no jurisdiction to hear Mr. Pham's constitutional issue, declined review.

The U.S. Court of Appeals dismissed Mr. Pham's appeal on the basis that it lacked jurisdiction because IIRIRA prohibits appeal from the BIA in deportation cases involving aggravated felony convictions.

To date, Mr. Pham's defense has never been heard.

REASONS FOR GRANTING THE PETITION

Petitioner is statutorily barred from using the Constitution to defend himself. Petitioner has never been granted a hearing where he can assert his defense. Under the current law, petitioner may assert his defenses against deportation, so long as those defenses do not challenge the constitutionality of an act of Congress. Respondent has stripped from the petitioner, any access to a defense to deportation when such defense is based upon the United States Constitution.

The Court of Appeals was in error because it saw itself as the court of review. Rather, the Court of Appeals had original jurisdiction to hear petitioner's defense, not review jurisdiction. The Court of Appeals erred when it dismissed petitioner's claim on the basis that Congress revoked its jurisdiction for judicial review. This is because there is nothing to review- petitioner's claim has never been heard. Petitioner's claim must first be heard before the issue of judicial review can arise.

We do not contend that Congress lacks authority to deprive petitioner of judicial review. Judicial review is not the issue here. The issue is that Congress has denied petitioner of a hearing. Pursuant to federal law, no court has jurisdiction to hear petitioner's defense. Congress has required petitioner to reach the Court of Appeals before he may raise a defense based upon constitutional law. Subsequently, Congress has revoked the Court

of Appeal's jurisdiction for "judicial review," effectively cutting denying any hearing of a constitutionally-based defense, whether that hearing be in a judicial or administrative court.

Pursuant to law, the petitioner may not assert constitutional issues before the Board of Immigration Appeals ("BIA"). *Bagues-Valles v. I.N.S.*, 779 F.2d 483 (9th Cir. 1995). Congress has recently enacted new law that prohibits petitioner from appealing a BIA decision. Thus, Congress has taken from the petitioner the protection of the Constitution.

The constitutionally-based defense that Congress prohibits petitioner to assert is the following:

Congress has violated petitioner's constitutional right to equal protection by its enactment of the statutory bar to 212(c) relief from deportation (as explained below).

The petitioner was never permitted to bring his equal protection claim to any court, and the reason was solely because his defense was based upon the Constitution. Section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009 (1996), prohibits a resident alien, who was ordered deported by reason of an aggravated felony conviction, from ever appealing a decision of the Board of Immigration Appeals ("BIA"). No court has ever heard petitioner's constitutional claim because the BIA has no jurisdiction to adjudicate constitutional issues. *Bagues-Valles v. I.N.S.*, 779 F.2d 483 (9th Cir. 1995). And pursuant to law, appeals of the BIA are properly brought before the U.S. Court of Appeals, not before the U.S. District Court.

Not only does the dismissal of the petitioner's appeal violate the petitioner's constitutional rights, but also as a case of first impression involving IIRIRA, it has created dangerous precedent. Since Congress was permitted to bar original jurisdiction of a constitutional claim, Congress has become totally invulnerable to the Constitution's commands and may absolutely trample constitutional rights without redress of any sort. Respondent, through an Act of Congress, revoked from the Court of Appeals below, the original jurisdiction to adjudicate petitioner's constitutional claim. The result is that no court has original jurisdiction to hear a defense to deportation for an aggravated felony, when that defense asserts a constitutional rights violation.

The statute upon which respondent relies is unconstitutional and should be struck down.

Since the BIA is prohibited from hearing constitutional issues, petitioner is barred from bringing his equal protection claim there. Petitioner is also barred from bringing his equal protection claim to the United States Court of Appeals because of IIRIRA Section 309(c)(4)(G). This section should be struck down as unconstitutional. It bars petitioner from a hearing solely because he brings into question the constitutionality of an act of Congress. Consequently, he has been stripped of the Constitution's protection.

I. CONGRESS MAY NOT DESTROY THE ORIGINAL JURISDICTION OF THE JUDICIARY TO HEAR CONSTITUTIONAL ISSUES BROUGHT BY A PERMANENT RESIDENT ALIEN

Section 309(c)(4)(G) of IIRIRA, enacted by Congress in 1996, prohibits a resident alien from appealing the BIA's decision to deport an alien by reason of an aggravated felony conviction. The statute, on its face, is a total bar to any and all appeals of such a decision. Because the BIA cannot adjudicate constitutional claims, IIRIRA Section 309 also serves as an absolute bar to all constitutional claims as well.

Congress does not have the power to deny petitioner of a hearing. This Court has held that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Company*, 455 U.S. 428, at 428 (1982). This Court explained as follows: "The Court has traditionally held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Id.*, at 429. The above rule has been applied to deportation appeals in the Ninth Circuit Court of Appeals. *Gonzalez-Julio v. I.N.S.*, 34 F.3d 820 (9th Cir. 1994). Therefore, Section 309(c)(4)(G) of IIRIRA violates the Fifth and Fourteenth Amendments' Due Process Clauses of the Constitution because Congress may not eliminate judicial authority in this manner.

Due process requires that a resident alien has a right to have his defense to deportation heard. *U.S. v. Lopez-Vasquez*, 1 F.3d 751

(9th Cir. 1993). It does not logically follow that Congress could constitutionally remove that right. This Court has specifically stated that although the power of deportation may be exercised with such judicial review as Congress may see fit to authorize or permit, this power of Congress is subject to judicial intervention under the law of the Constitution. *Carlson v. Landon*, 342 U.S. 524 (1952)

Authority cited by the respondent does not show that Congress may prevent the judiciary from exercising original jurisdiction over constitutional claims. Rather, respondent's authority tends to support the contrary. *Narayan v. I.N.S.*, 105 F.3d 1335 (9th Cir. 1997) and *Ibrik v. I.N.S.*, 108 F.3d 596 (5th Cir. 1997), involve aliens who have had their defenses heard. In contrast, petitioner has never had his defense heard.

Respondent's authority stands for the rule that congress may revoke judicial review. However, petitioner does not contend that he was denied judicial review. Petitioner was denied a hearing of his defense in a court with original jurisdiction. *Fulk v. United Transp. Union*, 108 F.3d 113 (7th Cir. 1997) and *Qasguargis v. I.N.S.*, 91 F.3d 788 (6th Cir. 1996), dismissed judicial review pursuant to congressional statutes. However, these Courts denied review only after granting a hearing and adjudicating the constitutional issue of retroactivity. The Court of Appeals below refused to hear or adjudicate petitioner's constitutional claim. Petitioner has not cited any authority that would authorize the Court of Appeals to deny petitioner of a hearing.

A. Petitioner's Constitutional Claim Has Never Been Heard Because the Board of Immigration Appeals Lacks Jurisdiction to Hear Constitutional Issues

No court has ever heard petitioner's constitutionally-based defense. The BIA has no jurisdiction to adjudicate constitutional issues. *Bagues-Valles v. I.N.S.*, 779 F.2d 483 (9th Cir. 1995). Petitioner asserted an equal protection claim to the BIA. The BIA, pursuant to law, declined to review petitioner's constitutional argument. Since the Court of Appeals has dismissed petitioner's appeal for lack of jurisdiction, there is no court to hear his constitutional claim. As a result, petitioner, as well as any other alien who is ordered deported by reason of an aggravated felony, is

unprotected from constitutional violations committed by the government.

B. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Section 309(c)(4)(G) Forbids Any Adjudication of Constitutional Issues Raised by Petitioner, and Is Therefore Unconstitutional and Should Be Struck down

Over one hundred years ago, this Court announced that aliens, as well as citizens, have a constitutional right to due process and to equal protection under the Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U.S. 355 (1886). Yet Congress has enacted legislation which boldly strips all constitutional rights from certain aliens. Congress has enacted IIRARI, which in Section 309(c)(4)(G), prevents aliens who have been ordered deported by reason of an aggravated felony conviction from ever having their constitutional defenses heard.

Respondent can produce no legal authority, which would permit such a stripping of constitutional rights. To the contrary, the Constitution is not only for citizens, but for resident aliens as well. Supreme Court Justice Matthews explained in 1886, that aliens have constitutional rights, and this fundamental core of constitutional law has survived for over one hundred years:

> The fourteenth amendment to the constitution is not confined to the protection of citizens. It says: "Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.

Id. at 369. When Congress enacts a statute, which prohibits an alien from raising a constitutionally-based defense, the result is to strip that alien of the protection of the entire Constitution itself.

II. SECTION 309(C)(4)(G) OF THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996 SECTION 309(C)(4)(G) IS UNCONSTITUTIONALLY BROAD AND SHOULD BE STRUCK DOWN

Section 309(c)(4)(G) of IIRIRA prohibits judicial review of any sort to a resident alien who has been ordered deported by reason of an aggravated felony. This bar against appeals is not limited in any manner according to the language in the text of the statute. Rather, it is overbroad and cuts across constitutional lines. The statute is unconstitutional as applied to petitioner. Therefore the statute is unconstitutionally overbroad and should be struck down.

III. PETITIONER SEEKS ADJUDICATION OF A CONSTITUTIONAL ISSUE, TO WHICH THE JURISDICTION OF THE UNITED STATES COURT OF APPEALS TO ADJUDICATE MAY NOT BE DESTROYED BY CONGRESS

Petitioner has a meritorious constitutional claim for which, under the current condition of the law, no court has original jurisdiction to hear. Should this Court reverse and remand to the Court of Appeals, petitioner would bring forth the following constitutional defense to his deportation under the Equal Protection Clause.

Aliens who are deportable or excludable may apply for a discretionary waiver of deportability by applying for 212(c) relief. The respondent is deportable by reason of a conviction for felonious assault, and he requested discretionary relief on the basis that he has maintained an unrelinquished domicile in the U.S. for seven consecutive years.

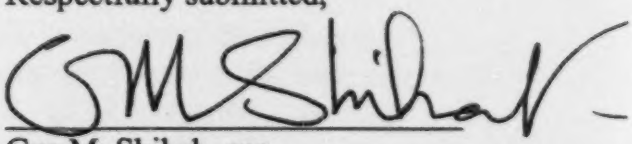
A. Section 440 of the AEDPA Violates the Fifth Amendment Because There Is No Rational Basis for Its Distinction Between Excludable Aliens and Deportable Aliens

Since section 440 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (1996) ("AEDPA") denies 212(c) relief under some situations to aliens in deportation proceedings but does not deny 212(c) relief to aliens in exclusion proceedings, The AEDPA amendment to 212(c) is unconstitutional because it violates the Fifth Amendment since there is no rational basis for this distinction. A law which is challenged to be unconstitutional on the basis that it violates the rights of aliens under the Equal Protection clause of the Fifth Amendment is subject to the review standard of "minimal scrutiny." *Francis v. I.N.S.*, 532 F.2d 268 (2d Cir. 1976), *Bedoya Valencia v. I.N.S.*, 6 F.3d 891 (2d Cir. 1991), *Cf. Yeung v. I.N.S.*, 61 F.3d 833 (11th Cir. 1995). Notwithstanding, determining the eligibility of 212(c) relief on the distinction of whether the alien is excludable or deportable was previously held to be unconstitutional under this standard of review on the basis that there is no rational basis for the distinction. *Francis v. I.N.S.*, supra., *Bedoya Valencia v. I.N.S.*, supra., *Cf. Yeung v. I.N.S.*, supra.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Gus M. Shihab, esq.

Dated: September 15, 1997

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 97-3354

THAI PHAM,

Petitioner,

v.

U.S. DEPARTMENT OF JUSTICE;
IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

DECIDED: June 19, 1997

Gus M. Shihab, Goldman, Shihab & Shihab, argued for petitioner.

Frank W. Hunger, David M. McConnell, and John J. Andre, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, argued for respondent.

Appealed from: Board of Immigration Appeals

ORDER

Before: Krupansky, Nelson, and Boggs, Circuit Judges.

The petitioner, Thai Pham, seeks review of a decision by the Board of Immigration Appeals ruling that as an aggravated felon, he is statutorily ineligible for relief from deportation. Pham now moves this court to stay his deportation pending disposition of his petition for review. The Immigration and Naturalization Service responds in opposition and moves to dismiss the petition for lack of jurisdiction. Pham opposes dismissal.

Pham does not dispute the INS's assertion that § 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 applies in this case and divests this court of jurisdiction over his petition for review. Pham argues, however, that such application will violate his constitutional rights due to the nature of the issues he intends to raise on review. We do not agree. "Deportation is not a criminal proceeding and has never been held to be punishment. No jury sits. No judicial review is guaranteed by the Constitution." *Carlson v. Landon*, 342 U.S. 524, 537 (1952). The Ninth Circuit has considered a similar revocation of jurisdiction contained within § 440(a) of the Anti-Terrorism and Effective Death Penalty Act of 1996, and concluded "[s]ince aliens have no constitutional right to judicial review of deportation orders, section 440(a) does not offend due process." *Duldulao v. INS*, 90 F.3d 396, 400 (9th Cir. 1996). *See also Yang v. INS*, 109 F.3d 1185, 1194-1197 (7th Cir. 1997); *Boston-Bollers v. INS*, 106 F.3d 352, 355 (11th Cir. 1997); *Kolster v. INS*, 101 F.3d 785, 790 (5th Cir. 1996). Upon consideration, we conclude we are without jurisdiction in this matter.

It is **ORDERED** that the motion to dismiss be granted. The stay motion is denied as moot.

ENTERED BY ORDER OF THE COURT

s/_____
Clerk

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

No. A23 882 386 - Orient

In the matter of:

THAI PHAM,

Respondent

In Deportation Proceedings

DECIDED: March 17, 1997

Gus M. Shihab, Goldman, Shihab & Shihab, argued for petitioner.

Victoria A. Christian, Immigration and Naturalization Service, U.S. Department of Justice, argued for respondent.

Appealed from: Immigration Court

ORDER

PER CURIAM. You are seeking relief from deportation under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). However, you are statutorily ineligible for such relief as an "alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)." See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA") § 440(d); Matter of Soriano, Interim Decision 3289 (A.G., Feb. 21, 1997). Accordingly, your appeal is dismissed.

You have argued on appeal that AEDPA violates the equal protection clause of the Constitution because the new 212(c) provisions apply only in deportation proceedings and not in exclusion proceedings. The issue of whether the AEDPA 212(c) restrictions apply in exclusion proceedings has not yet been decided. However, even assuming that section 212(c) relief is now more widely available in exclusion proceedings than in deportation, we cannot rule on the constitutionality of laws enacted by Congress. See, e.g., Matter of C-, 20 I&N Dec. 529 (BIA 1992).

If you conceded deportability prior to the enactment of AEDPA on April 24, 1996, in reliance on the availability of section 212(c) relief, you may have proceedings reopened for the limited purpose of contesting deportability. See Matter of Soriano, supra. If you wish to have proceedings reopened for this limited purpose, you must submit a signed written request to that effect directly to the Board, at the address on the attached letter, without payment of any fee. Please include a copy of this decision with any such request and mark "SORIANO REOPENING" on the request and on the outside of the envelope. You must serve a copy of such request on the Immigration and Naturalization Service.

s/_____
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

No. A23 882 386 – Ohio CAP

In the matter of:

THAI PHAM,

Respondent

In Deportation Proceedings

DECIDED: May 14, 1996

Gus M. Shihab, Goldman, Shihab & Shihab, argued for petitioner.

Russell A. Ezolt, Immigration and Naturalization Service, U.S. Department of Justice, argued for respondent.

DECISION OF THE IMMIGRATION JUDGE

The respondent is a male native and citizen of Vietnam who was originally admitted to the United States as a refugee on January 17, 1980. On March 27, 1981, his status was adjusted to that of a lawful permanent resident (retroactive to his original date of admission). However, proceedings were instituted on August 31, 1994 with the issuance of an Order to Show Cause, charging him with deportability under the above-captioned section of the Immigration & Nationality Act by virtue of his conviction on June 7, 1994 for the offense of Felonious Assault in violation of Section 2903.11(A)(1) of the Ohio Revised Code ("ORC"), for which he was sentenced to a term of imprisonment of three to fifteen years.

The respondent, through counsel, has admitted the truthfulness of the factual allegations set forth in the Order to Show Cause and conceded deportability. I therefore find that evidence of his

deportability is clear, convincing and unequivocal. Vietnam has been designated as the country to which deportation should be directed should such action become necessary.

The respondent has submitted an Application for Waiver of Inadmissibility under Section 212(c) of the Act. However, he now appears to have been rendered statutorily ineligible for this form of relief by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (1996) ["AEDPA"] which amended Section 212(c) to bar an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i).

The Act is silent as to the effective date of this amendment. The Board has held that in the absence of an express provision to the contrary, an act of Congress takes effect on its date of enactment 1/ and that where new statutory provisions affecting eligibility for relief come into effect during the pendency of a deportation hearing (and there exists no statutory directive to the contrary), the new statutory provisions shall be applied to the application for relief and the application may be denied on the basis of the statutory amendment. Matter of U-M-, 20 I & N Dec. 327 (BIA 1991); Matter of A-A-, 20 I & N Dec. 492, 501, n. 21 (BIA 1992)

The respondent does not appear eligible to apply for any other form of relief from deportation, including asylum and withholding of deportation, by virtue of his aggravated felony conviction. Accordingly, the following orders will be entered:

ORDER: IT IS ORDERED that the respondent's Application for a Waiver of Inadmissibility under Section 212(c) of the Act is DENIED.

IT IS FUTHER ORDERED that the respondent be deported from the United States to Vietnam on the charge contained in the Order to Show Cause.

Date: May 14, 1996 s/_____
James R. Fujimoto
Immigration Judge

1/ The date of enactment of AEDPA is April 24, 1996.

ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, § 440(d)

(d) CLASSES OF EXCLUDABLE ALIENS. –Section 212(c) of such Act (8 U.S.C. 1182(c)) is amended—

(1) by striking "The first sentence of this" and inserting "This"; and

(2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i).".

ILLEGAL IMMGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996, § 309(c)(4)(G)

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

IMMIGRATION AND NATIONALITY ACT § 212(c), 8 U.S.C. § 1182(c)

(c) Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i).

(2)

Supreme Court, U.S.
FILED
NOV 19 1997
CLERK

No. 97-502

In the Supreme Court of the United States

OCTOBER TERM, 1997

THAI PHAM, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Solicitor General
Department of Justice
Washington, DC 20530-0001
(202) 514-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-502

THAI PHAM, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that recent statutory changes have unconstitutionally denied him any forum in which to raise a constitutional challenge to the final order of deportation entered against him.

1. Petitioner is a native and citizen of Vietnam who entered the United States as a refugee in 1980 and became a lawful permanent resident in 1981. Pet. App. A5. In June 1994, petitioner was convicted of felonious assault under Ohio law and sentenced to three-to-fifteen years' imprisonment. *Ibid.* The Immigration and Naturalization Service (INS) thereafter commenced deportation proceedings against petitioner, on the ground that his felony conviction rendered him deportable under Section 241(a)(2)(A)(iii) of

the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(2)(A)(iii) (1994). See Pet. App. A5. Petitioner conceded deportability, but he requested a discretionary waiver of deportation pursuant to former Section 212(c) of the INA, 8 U.S.C. 1182(c). Pet. App. A5-A6.

On April 24, 1996, while petitioner's deportation proceeding was pending, the President signed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. Section 440(d) of AEDPA (110 Stat. 1277) amended Section 212(c) of the INA to eliminate the Attorney General's discretion to grant relief from deportation under that Section to any alien who "is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii)" of the INA.[1] In May 1996, an immigration judge held that the amendment of Section 212(c) had rendered petitioner statutorily ineligible for discretionary relief under that Section, and that petitioner "[did] not appear eligible to apply for any other form of relief from deportation, including asylum and withholding of deportation, by virtue of his aggravated felony conviction." Pet. App.

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[1] Section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-587, repealed Section 212(c) in its entirety and replaced it with Section 240A of the INA, 8 U.S.C. 1229b (Supp. II 1996), which authorizes a new form of discretionary relief termed "cancellation of removal." See IIRIRA § 304(a)(3) and (b), 110 Stat. 3009-594, 3009-597. The new provisions generally apply only to administrative proceedings initiated on or after April 1, 1997. See IIRIRA § 309(a) and (c), 110 Stat. 3009-625, as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657. In any event, petitioner's conviction of an "aggravated felony" (see 8 U.S.C. 1101(a)(43)(F) (Supp. II 1996)) would make him ineligible for relief under the new provisions. See 8 U.S.C. 1229b(a)(3) (Supp. II 1996).

A6. The immigration judge therefore denied petitioner's application for discretionary relief and ordered him deported. *Ibid.*

The Board of Immigration Appeals (BIA) sustained the immigration judge's decision. Pet. App. A3-A4. Relying on the Attorney General's decision in *In re Soriano* (Feb. 21, 1997), rev'g Int. Dec. No. 3289 (BIA 1996), the Board agreed that the amendment made by Section 440(d) of AEDPA took effect upon enactment, rendering petitioner statutorily ineligible for discretionary relief under Section 212(c). Pet. App. A3.[2] The Board declined to consider petitioner's argument that AEDPA irrationally differentiated between exclusion and deportation proceedings, because the Board "cannot rule on the constitutionality of laws enacted by Congress." *Id.* at A4. In accordance, however, with the Attorney General's direction in *Soriano*, slip. op. at 8, the Board indicated that it would, on request, order that petitioner's deportation proceeding be reopened for the limited purpose of allowing him to retract his concession of deportability. Pet. App. A4.

2. On April 14, 1997, petitioner filed a motion to reopen his deportation proceeding. Admin. Rec. 7. The BIA granted that motion on April 16, 1997 (*id.* at 2), and the reopened proceeding is presently pending.

Petitioner also filed a petition with the United States Court of Appeals for the Sixth Circuit, seeking review, under former Section 106(a) of the INA,

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[2] A copy of the Attorney General's opinion in *Soriano* was lodged with the Clerk of this Court in connection with the filing of the government's brief in opposition to the certiorari petition in No. 96-1310, *Salazar-Haro v. INS*, cert. denied, 117 S. Ct. 1842 (1997).

8 U.S.C. 1105a(a) (1994), of the BIA's decision in his case. See Pet. App. A1. The INS moved to dismiss the petition, arguing that Section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-626 (as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657), divested the court of jurisdiction to review final orders of deportation entered against alien aggravated felons. See Pet. App. A2. Petitioner did not contest the applicability of Section 309(c)(4)(G), and the court of appeals rejected his constitutional challenge to its preclusion of judicial review. *Ibid.* Accordingly, the court granted the government's motion to dismiss, in an order dated June 19, 1997. *Ibid.* Neither petitioner nor the government informed the court of appeals of the Board's order reopening petitioner's deportation proceeding.

3. Petitioner contends (Pet. 3-9) that IIRIRA's preclusion of judicial review of final orders of deportation entered against certain alien felons deprives him of a right to have some tribunal hear his claim that Section 212(c) of the INA, as amended by AEDPA (and before its repeal by IIRIRA), unconstitutionally differentiates among aliens on the basis of whether they were subject, under prior law, to exclusion or to deportation. Whatever the merits of that contention, it is not presently ripe for review by this Court. At petitioner's request, the BIA has ordered that his deportation proceeding be reopened so that he may withdraw his concession of deportability and instead contest that issue before the immigration judge (and then before the BIA). The granting of a motion to reopen deprives the deportation order previously issued against petitioner of the finality necessary, under

any circumstances, for judicial review. See 8 U.S.C. 1105a(a) and (c) (1994) (applicable to this case under IIRIRA § 309(c)); 8 C.F.R. 3.2(i) (1997); *In re Pineda*, Int. Dec. No. 3326, 1997 WL 525545 (BIA 1997).

Having sought and obtained an opportunity for further administrative review of the threshold issue of deportability, petitioner must now exhaust that potential source of relief before seeking further judicial review. If, in the reopened proceedings, the BIA ultimately finds petitioner to be deportable and enters a new final order of deportation against him, and if the court of appeals then adheres to its previous judgment that it is without jurisdiction to review that order, then petitioner may present his constitutional claim concerning Section 309(c)(4)(G), together with any challenge to the judgment on deportability rendered by the BIA in the reopened proceeding, in one petition for a writ of certiorari. Until that time, review of the decision below would be premature.

We therefore respectfully submit that the present petition for a writ of certiorari should be denied.[3]

SETH P. WAXMAN
Solicitor General

NOVEMBER 1997

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[3] Because this case is in an essentially interlocutory posture, we have not responded on the merits to the questions presented by the petition. We will file a response on the merits if the Court so requests.